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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CYNTHIA DELANG, Plaintiff and Appellant, v. JOSEPH G. FRAKE, Defendant and Respondent.	2d Civil No. B150604 (Super. Ct. No. SC024890) (Ventura County)

Appellant Cynthia Delang sued her former dentist, respondent Dr. Joseph Frake, for professional negligence, breach of contract, and battery. The trial court granted respondent's motion for summary judgment on the ground that appellant's claims were barred by the applicable statute of limitations. She contends that respondent did not show that her negligence claim was barred by the applicable one-year statute of limitations. (Code Civ. Proc., § 340.5.)[1] We affirm.

Procedural and Factual History

In December of 1994, appellant sought dental treatment from respondent. They developed a treatment plan for both sides of her mouth which did not include the use of amalgam fillings on any teeth. Appellant alleges that at the time of the initial examination, she explained that she was prone to allergic reactions if mercury and certain

[1] All statutory references are to the Code of Civil Procedure.

other metals were placed in her mouth, and that she wanted only gold, titanium, or porcelain materials.

Appellant alleges that in June of 1996, amalgam or mercury was used on three of her teeth as a permanent restoration following root canals. Appellant subsequently discovered the fillings and, on April 18, 1997, telephoned respondent's office, complaining that she did not want silver or mercury fillings in her mouth and should not have to pay for them. On August 28, 1997, the mercury fillings were removed and replaced with composite material. The parties agree that this was the last date appellant was treated by respondent.

Nearly five months later, on January 9, 1998, appellant telephoned respondent, expressing concerns over her dental treatment. The medical record reads: "Cynthia called--has many concerns re her dental [treatment]. (1) Not gold under [porcelain crown]. (2) Teeth have spaces that catch food. (3) Bite is off. (4) Mercury or other metals in her mouth. Dr. Frake said she MUST bring her husband for this consult."

Appellant alleges that during the ensuing year, she continued to experience pain and discomfort in the areas of her mouth treated by respondent. She alleges that in or about the beginning of 1999, the pain and discomfort emanating from the areas respondent had worked on intensified to the point that she began to question his initial diagnosis of her dental needs and prognosis for recovery. She noticed spaces developing between her teeth, the bite on the left side of her mouth was uneven, her teeth were starting to crack, and one tooth had embedded itself into the inward portions of her lower lip. She alleges that she sought advice from others in the dental field, only to learn that her teeth would require several more years of dental work, including braces, to correct the work respondent had done, and that the cost of the dental treatment would exceed $20,000.

On October 13, 1999, appellant filed a complaint against respondent, seeking recovery of damages for six causes of action. In March of 2000, she amended her complaint to add a seventh cause of action for professional negligence. The trial court then sustained respondent's demurrer, leaving three causes of action in dispute: (1)

breach of an implied contract to perform dental treatment in a manner generally accepted by the community; (2) battery by using mercury fillings without her consent; and (3) professional negligence.

Respondent moved for summary judgment on the ground that all three of the above causes of action were barred by the applicable statutes of limitations. He argued the alleged battery occurred in June of 1996, when the amalgam or mercury fillings were inserted in her mouth. Appellant filed this action in October of 1999, well beyond the one-year limitations period prescribed by section 340, subdivision (3). He contended the breach of contract claim was barred by the two-year limitations period set forth in section 339, subdivision (1), and accrued no later than August 28, 1997, the last date respondent had treated her. Finally, he contended the professional negligence cause of action was governed by the one-year period set forth in section 340.5, which accrued on the date she discovered or, through the use of reasonable diligence, should have discovered her injury. He argued the latter cause of action accrued at the latest on January 9, 1998, when appellant telephoned his office and complained about the dental treatment she had received. He argued she was alerted to the necessity for investigation as of this date and filed the instant action more than one year later.

In support of his motion, respondent submitted the declaration of his attorney, Thomas R. Bradford. Mr. Bradford's declaration attached the medical records from respondent's office documenting appellant's telephone call to respondent on January 9, 1998, and appellant's responses to interrogatories showing the last date of treatment. Appellant did not object to the evidence submitted by respondent.

In opposition to the motion, appellant contended that she did not discover her injuries until August or September of 1999, one month before she filed suit. She submitted a declaration stating: "August 28, 1997 was the last visit I had in the office of [respondent] for dental care. [¶] . . . In January 1998 I called [respondent's office] concerning what metals he had placed in my mouth for fillings and crowns. I also discussed the bite at tooth #19 which was uncomfortable when biting down. He assured me that time would take care of these problems. I believed him. Over the next year I

became accustomed to the bite and thought he was correct. [¶] . . . I did not receive any dental care between August 28, 1997 and August 17, 1999. I did not feel I had any dental injury or damage until 1999 when a tooth broke and I made an appointment to see Dr. Harrison [on] August 17, 1999." According to appellant, Dr. Harrison advised that her bite was off due to prior dental work, the improper bite had caused her tooth to break, and her teeth were developing cracks. She saw another dentist in September of 1999, Dr. Bankhardt, who advised her that she needed extensive dental work, including possible orthodontics. She maintained that it was not until August or September of 1999 that she first suspected she had been injured as a result of respondent's dental care.

In reply, respondent noted that appellant had not contested the motion insofar as it sought a summary adjudication of the battery and breach of implied contract claims. With respect to the negligence claim, respondent argued that appellant had actual or presumptive knowledge of her injury on January 28, 1998, when she telephoned his office expressing concerns about the dental care she received, specifically, her bite being off, the spaces between her teeth, and the use of mercury or metals in her mouth. Respondent insisted that it was on this date that she had sufficient information to place a reasonable person on inquiry and commence the running of the statute of limitations.

Following a hearing, the trial court granted the motion, ruling that there were no triable issues of material fact because the complaint was barred by the statute of limitations. The court noted that appellant had not attacked the genuineness of the medical record submitted by respondent summarizing the telephone call she had made in January of 1998. The court stated: "[I]t appears to me that the evidence supports the conclusion that [appellant] was on notice that she had a problem and she needed to make further inquiry and get an answer, particularly in the context of the relationship that she had with this doctor, and that it appears to me as if the time had passed. The action was commenced too late. [¶] . . . [O]ther than [appellant's] statement, I have no other evidence, and yet evidence from the doctor's records seems so clear that what we are talking about is much more than general discomfort. [¶] In that context, I believe, then, that the defendant has met his burden of proof, that I should grant the motion for

summary judgment, that the statute of limitations had run by the time the action was commenced."

Discussion

Appellant's sole contention on appeal is that the trial court erred in concluding that her negligence cause of action was barred by the one-year statute of limitations set forth in section 340.5. She argues respondent concealed the true facts essential to her claim by assuring her, during her telephone call in January of 1998, that time would take care of her problems. She adds that respondent presented no declaration or other evidence negating the existence of concealment and, therefore, did not meet his burden of proof.

We review the trial court's decision to grant summary judgment de novo. (*Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 713.) Summary judgment is properly granted if the moving defendant demonstrates as a matter of law that none of the plaintiff's causes of action can prevail, either by establishing that a necessary element of the cause of action does not exist, or there is a complete defense to that cause of action. (*Ibid*.; § 437c, subd. (o)(2).) Once defendant meets this burden, the burden shifts to plaintiff to show that a triable issue of material fact exists "as to that cause of action or a defense thereto." (§ 437c, subd. (o)(2).)

The parties agree that appellant's negligence cause of action is governed by the one-year statute of limitations set forth in section 340.5. Under this statute, the one-year period begins to run when the plaintiff discovers the injury and its negligent cause or, by the exercise of reasonable diligence, should have discovered it.[2] (*Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 101; *Kleefeld v. Superior Court* (1994) 25 Cal.App.4th 1680, 1683-1684.) "'Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. . . . [T]he limitations period

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[2] Section 340.5 provides in part that an action for injury against a health care provider based upon alleged professional negligence must be filed within "three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first."

begins once the plaintiff "has notice or information of circumstances to put a reasonable person *on inquiry* . . . ." A plaintiff need not be aware of the specific "facts" necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.'" (*Dolan v. Borelli* (1993) 13 Cal.App.4th 816, 822, quoting *Jolly v. Eli Lilly & Co*. (1988) 44 Cal.3d 1103, 1110-1111, citations omitted.)

Ordinarily, in malpractice actions, the statute of limitations does not commence to run during the continuance of the physician-patient relationship, unless the patient has discovered the injury or, through the use of reasonable diligence, should have discovered it. (*Sanchez v. South Hoover Hospital, supra,* 18 Cal.3d at p. 102.) During the continuance of the professional relationship, the degree of diligence required of a patient in learning of the negligent causes of his or her condition is diminished. (*Ibid.*)

Here, the evidence submitted in support of respondent's motion for summary judgment demonstrated as a matter of law that appellant's negligence claim was barred by the applicable one-year period. The undisputed evidence showed that mercury fillings were removed from her mouth at her request in August of 1997, the last date she sought treatment from respondent. Five months later, she telephoned respondent complaining about the dental care she received, the materials used in her mouth, the spaces between her teeth, and her bite. Her complaints pertained to the very injury for which she seeks recovery in this action. Her telephone call shows an awareness of an injury and a suspicion of wrongdoing. "'[W]hen the plaintiff has notice or information of circumstances to put a reasonable person *on inquiry*, or *has the opportunity to obtain knowledge* from sources open to his investigation . . . the statute commences to run.'" (*Sanchez v. South Hoover Hospital, supra*, 18 Cal.3d at p. 101.) Her complaint, which was filed in October of 1999, more than one year later, was time barred. Application of the discovery rule, thus, supports the trial court's judgment.

We reject appellant's contention that respondent did not properly support his summary judgment motion with declarations or authenticate the medical record documenting her January of 1998 telephone call to his office. Appellant may be correct that the medical record was not properly authenticated, although it could have been produced concurrently with respondent's verified responses to interrogatories. Nevertheless, appellant raised no objections in the trial court to the format of respondent's motion or to the evidence submitted in support thereof. Her failure to raise an objection in the trial court constitutes a waiver of the evidentiary issue. (§ 437c, subd. (d) [objections based on failure to comply with the requirements of this subdivision shall be made at the hearing or be deemed waived].) We conclude that respondent met his burden on summary judgment.

Appellant also suggests that the trial court erroneously disregarded the declaration she submitted in opposition to respondent's motion for summary judgment. She argues her declaration creates a question of fact as to the date her negligence claim accrued. Although the court noted in passing that her declaration could be construed as self-serving, the record reveals that the court considered it but properly concluded that her telephone call to respondent demonstrated her awareness of her injury and the facts essential to her claim. As the trial judge stated: "[Appellant] is calling back and something is on her mind that causes her to raise these very points with the doctor's staff. Something is telling her she has got a problem. [¶] . . . [¶] It looks to me as if an event is occurring with [appellant] which is causing her to inquire, and I'm concerned when she is expressing concerns with respect to this level of detail, the facts exist which warrant her making inquiry of perhaps another doctor."

We reject appellant's contention that the one-year statute of limitations period was tolled due to respondent's alleged concealment of facts. "[C]oncealment is an exception to the three-year, not one-year, limitations period in section 340.5. 'Section 340.5 creates two separate statutes of limitations, both of which must be satisfied if a plaintiff is to timely file a medical malpractice action. First, the plaintiff must file within one year after she first "discovers" the injury *and the negligent cause* of that injury.

Secondly, she must file within three years after she first experiences harm from the injury. This means that if a plaintiff does not "discover" the negligent cause of her injury until more than three years after she first experiences harm from the injury, she will not be able to bring a malpractice action against the medical practitioner or hospital whose malpractice caused her injury. [Citations.] [¶] There are, however, three exceptions to the three-year limitation period – fraud, intentional misrepresentation, and the presence of a nontherapeutic "foreign body" in the plaintiff's body.'" (*Dolan v. Borelli, supra,* 13 Cal.App.4th at pp. 824-825.) There is no dispute in this case that appellant met the three-year limitations period. Her discovery of her injury and its negligent cause, however, requires her to meet the one-year period. As *Kleefeld* noted, "[t]here is no tolling provision in the one-year limitation, not even for fraud or concealment, much less for the pursuit of evidence of negligence." (*Kleefeld v. Superior Court*, *supra*, 25 Cal.App.4th at p. 1685; *Sanchez v. South Hoover Hospital*, *supra*, 18 Cal.3d at p. 101.)

Finally, *Enfield v. Hunt* (1979) 91 Cal.App.3d 417, cited by appellant, is factually distinguishable. There, the plaintiff experienced right foot paralysis immediately after lumbar disc surgery but was assured by her physician the condition was temporary and would improve. She subsequently made reasonable, but unsuccessful, efforts to identify the cause of the paralysis by seeing other physicians and an attorney who advised her that temporary paralysis could occur with the exercise of reasonable care. After her condition was deemed permanent by yet another physician, she filed suit. The trial court granted defendant's motion for summary judgment on the ground that her action was not brought within one year after she discovered or, through the use of reasonable diligence, should have discovered her injury. The Court of Appeal reversed, concluding that a question of fact remained in dispute as to whether she exercised due diligence in discovering her injury. "It would be contrary to public policy to reach a result in this case which would in effect require an attorney to file a malpractice action at a time when the evidence available to the attorney indicates the action has no merit." (*Id*. at p. 424.)

Here, unlike the facts of *Enfield*, appellant expressed an awareness of the facts essential to her claim and injury and did nothing for one year and ten months. She was not receiving equivocal advice from a lawyer regarding a possible violation of the standard of care by respondent. The trial court properly concluded that her claim was barred by the one-year limitations period. (§ 340.5.)

The judgment is affirmed. Respondent is awarded costs on appeal.

NOT TO BE PUBLISHED

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Kent M. Kellegrew, Judge

Superior Court County of Ventura

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C. B. Henrichsen for Plaintiff and Appellant.

Bonne, Bridges, Mueller, O'Keefe & Nichols, Mark B. Connely, Thomas R. Bradford and Brent E. Levine for Defendant and Respondent.